BRIEF

in Support of Petition for Writ of Certiorari

Specification of Errors

The petitioner assigns the following errors in the record and proceedings of said cause:

1. The conviction deprives petitioner of liberty and property without due process of law contrary to the Fourteenth Amendment to the United States Constitution in that the judgment of conviction was entered without a finding that respondent clearly established by evidence the "existence of facts supporting the legislative judgment" so as to overcome the presumption of unconstitutionality which attaches to the ordinance by reason of its operating as a prima facie denial and infringement of the constitutional right of freedom of worship.

2. The conviction deprives petitioner of liberty and property without due process of law contrary to the Fourteenth Amendment to the United States Constitution in that the judgment of conviction was entered without a finding that respondent justified the operation of the ordinance by evidence clearly establishing that it was a reasonable means to the end sought to be accomplished and was not arbitrary, unreasonable or oppressive.

3. The ordinance is unconstitutional as construed and applied because it abridges and denies petitioner's right to educate, teach and direct the spiritual welfare of her daughter, to maintain a family and to discharge her moral obligation as mother, while the child is denied the right to the benefits of such relationship, all contrary to the First and Fourteenth Amendments to the United States Constitution.

4. The ordinance is unconstitutional as construed and applied because it abridges and denies petitioner's and her daughter's freedom to worship Almighty God according to the commands of Jehovah and their freedom of conscience,

contrary to the First and Fourteenth Amendments to the United States Constitution.

5. The ordinance is unconstitutional as construed and applied because it abridges and denies petitioner's and her daughter's privileges, rights and immunities secured by the Constitution, in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

6. The conviction deprives petitioner of her liberty and property without due process of law, contrary to the due process clause of the Fourteenth Amendment to the United States Constitution in that there is an absence of evidence in the record to establish that she violated the ordinance in question.

ARGUMENT

An appreciation of the problem presented by the "due process clause" must begin by realizing that what the combined effect of the First and Fourteenth Amendments has done is to place upon the Court the duty of weighing the specific individual interests comprehended under the terms freedom of speech, freedom of press, freedom of worship, and freedom of assembly, as against the claims of society and of the state which are subsumed under the general phrase, the "police power". The work of examining, valuing and balancing these conflicting claims cannot be accomplished by a tired-eyed scrutiny of the words of the Constitution nor by attempting to limit and stake the boundaries of the police power. The task can be done only by careful analysis of the concrete interests involved, proceeding with the aid of certain legal postulates adopted in the fields already traversed.

Among the most frequently utilized of these postulates is that denominated "presumption of validity", which is applied to legislative declarations. Piloted by this presumption, the Court has, within recent times, resolved many con-

troversies arising under the general terms "liberty" and "property" of the Fourteenth Amendment.

However, in the instant case, a new problem is presented because the nebulous character of these terms finds dynamic reality in the specific language of the First Amendment which places the basic franchises of human freedom in a preferred position. An additional postulate thus becomes necessary to prevent the very real possibility of a gradual process of emasculation of the first Amendment by legislative enactments based upon a fictional need of police authority. Such protection of the "four freedoms" can be achieved only by surrounding them with a *presumption of invulnerability.* Applying such a presumption, the judiciary rightfully becomes the jealous guardian of freedoms which have no other defender. So-called "police legislation", which either on its face or as construed and applied, infringes on the domain of these freedoms is at once thrown back, if those who seek to enforce its restraint fail to surmount the presumption of invulnerability by establishing (1) the existence of facts supporting the legislative judgment (a clear and present danger to the child's welfare) and (2) that it is a reasonable means to the end sought to be accomplished and is not arbitrary, unreasonable or oppressive.

In this case, a conflict has arisen between a child's constitutional right of freedom of worship on the one hand, and an ordinance enacted under the state's interest as *parens patriae* pursuant to its police authority on the other. The state has made no attempt to establish the necessity of the restrictive ordinance by evidence showing the existence of facts supporting its legislative judgment nor has it attempted to prove the reasonableness of the ordinance by showing that the restriction was a reasonable means to the end it seeks to accomplish and not arbitrary, unreasonable or oppressive. Thus the issue is squarely presented: *Does the police authority asserted in derogation of free enjoyment of the rights secured by the First Amendment find constitutional justification in legislative declarations and*

judicial presumptions, or, on the contrary, is it justified only by evidence establishing the reasonableness of its operation and necessity of its object by proof of a serious, clear and present danger?

This is a federal question of fundamental importance, and one which has never before been directly passed on by this Court. In none of the many cases involving the "due process" clause of the Fourteenth Amendment has this question been decided, although there have been some strong allusions in the dictum of a few opinions. But the dictum has not entirely clarified the problem which has been squarely raised in this case. The majority opinion in *Prince* v. *Commonwealth of Massachusetts,* 321 U. S. 158, decided last term, did not reach this important problem, even though facts in *this* case present a similar situation.

An examination of the record discloses that the courts below did not apply the "presumption of invulnerability" in favor of the constitutional right of freedom of worship. [220-221] Hence petitioner now says that she has been deprived of her liberty and property without due process of law.

The correct statement of the law regarding the application of the presumption is mentioned by Mr. Justice Jackson in *The Struggle for Judicial Supremacy* (New York, Knopf, 1941) at page 285:

> "The presumption of validity which attaches in general to legislative acts is frankly reversed in the case of interferences with free speech, free press and free assembly, and for a perfectly cogent reason. Ordinarily, legislation whose basis in economic wisdom is uncertain can be redressed by the processes of the ballot box or the pressures of opinion. But when the channels of opinion and of peaceful persuasion are corrupted or clogged, these political correctives can no longer be relied on, and the democratic system is threatened at its

> most vital point. In that event, the Court, by intervening, restores the processes of democratic government; it does not disrupt them."

This rule applies with much greater force of reason to freedom of worship not mentioned in the above quotation. That any individual's right to worship God should be made dependent on the ballot box or pressure of opinion is manifestly repugnant to the constitutional system, and this Court so declared. (*West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638-640) Religious minorities have no voice in the ballot box nor arm of force to mold public opinion. The judiciary is the ultimate guardian of the people's freedom to worship. Thus far, the judiciary in this case has failed to protect petitioner's freedom of worship.

With due respect to the Court, it nevertheless appears that the technical and complicated problem of child welfare is not so well settled and generally acknowledged that any particular conclusion from the facts here will admit of judicial notice. Without expert evidence—or any evidence—showing the result of the activity upon the health and welfare of a child, how can any court rule as a matter of law that it is detrimental? This is not a proper judicial function. If the City of Portland had any proof that the health of the child was being impaired, it should have introduced competent testimony to support this part of its case, instead of submitting it upon the court's suggested stipulation.

In situations of this kind, the Court has many times relied upon scientific testimony to resolve the difficulty and

the present tendency is in that direction.* "Legislation cannot be judged by theoretical standards. It must be tested by the concrete conditions which induced it." *Mutual Loan Co.* v. *Martell,* 222 U. S. 225, 233. Mr. Justice Holmes declared in *Otis* v. *Parker,* 187 U. S. 606, 608, that "the mere fact that an enactment purports to be for the protection of public safety, health or morals, is not conclusive upon the courts".

That the child in this case was endangered by the activity, under the circumstances shown in the record, certainly lacks a "probable basis in fact". Evidence bearing upon the question of whether or not the activity was detrimental to health or morals would be more readily accessible to the City than to the citizens. Justice dictates, therefore, that it was the burden of the respondent city to prove by competent evidence to what extent, if any, the activity was injurious to petitioner's daughter.

In his dissenting opinion filed in the *Prince* case, Mr. Justice Murphy pointed out that the Commonwealth of Massachusetts had not discharged the burden of proof it carried in rebutting the presumption of invulnerability that attaches to the right of freedom of worship. He said, "In dealing with the validity of statutes which directly or indirectly infringe religious freedom and the right of parents to encourage their children in the practice of a religious belief, we are not aided by any strong presumption of the constitutionality of such legislation. . . . On the contrary, the human freedoms enumerated in the First Amendment and carried over into the Fourteenth Amendment are to be

* See *Muller* v. *Oregon,* 208 U. S. 412, 419-420; *McLean* v. *Arkansas,* 211 U. S. 539, 548-551; *Price* v. *Illinois,* 238 U. S. 446, 453, for instances of the Court's use of factual testimony. Mr. Justice Brandeis employed such material extensively. See his dissents in *Adams* v. *Tanner,* 244 U. S. 590; *Truax* v. *Corrigan,* 257 U. S. 312; *Jay Burns Baking Co.* v. *Bryan,* 264 U. S. 504. In *Chastleton Corp.* v. *Sinclair,* 264 U. S. 543, the Court remarked upon the failure of those arguing for the constitutionality of the District of Columbia rent law to show a continuation of the emergency which had justified the law's existence. The tendency of the Court to make use of scientific testimony has been generally applauded. See Frankfurter, "Hours of Labor and Realism in Constitutional Law." (1916) 29 Harv. L. Rev. 353.

presumed to be invulnerable and any attempt to sweep away those freedoms is prima facie invalid. It follows that any restriction or prohibition must be justified by those who deny that the freedoms have been unlawfully invaded. The burden was therefore on the State of Massachusetts to prove the reasonableness and necessity of prohibiting children from engaging in religious activity of the type involved in this case. . . . The state, in my opinion, has completely failed to sustain its burden of proving the existence of any grave or immediate danger to any interest which it may lawfully protect."

Had the majority of this Court in the *Prince* case applied the presumption in favor of the challenged freedoms, and scrutinized the record for "evidence in support of the legislative judgment", it would have been found that Mr. Justice Murphy's appraisal of the record is correct. However, the majority opinion of the Court did not discuss the matter of presumption, and hence that opinion does not foreclose this issue here. Furthermore, that the permissible sphere of the state's police power may be larger as respects children than with adults does not at all bear on the question presented in this case. Here, the principal issue is whether or not the state has succeeded in establishing justification for the prohibition it has placed on petitioner's daughter's manner of worship of Almighty God.

The rule discussed by Mr. Justice Murphy in his dissenting opinion in the *Prince* case was effectively applied by the United States Court of Appeals for the District of Columbia in *Busey* v. *District of Columbia,* 138 F. 2d 592, decided November 8, 1943. In that case an occupational license tax was sought to be applied to the activity of Jehovah's witnesses. The controversy reached this Court last term after the precedent case of *Murdock* v. *Pennsylvania,* 319 U. S. 105, had been decided. The case was remanded to the Court of Appeals for further consideration. (319 U. S. 579) Upon reconsideration, Mr. Justice Edgerton, speaking for the court (p. 595), held:

"Freedoms of speech, press, and religion are entitled to a preferred constitutional position because they are 'of the very essence of a scheme of ordered liberty.' (*Palko* v. *Connecticut,* 302 U. S. 319, 325) They are essential not only to the persons or groups directly concerned but to the entire community. Our whole political and social system depends upon them. Any interference with them is not only an abuse but an obstacle to the correction of other abuses. (Civil liberties are at present relatively little threatened by governmental action, but in many communities the civil liberties of unpopular groups are greatly threatened by private terrorism. Legal recognition of these liberties tends to discourage this terrorism.) . . .

"*We think we may now hold that when legislation appears on its face to affect the use of speech, press, or religion, and when its validity depends upon the existence of facts which are not proved, their existence should not be presumed;* at least when their existence is hardly more probable than improbable, and particularly when proof concerning them is more readily available to the government than to the citizen. *The burden of proof in such a case should be upon those who deny that these freedoms are invaded.* . . . No presumption which lacks a probable basis in fact should be permitted to conceal an interference with essential freedoms." [Italics added]

The decision of this Court in *United States* v. *Carolene Products Co.,* 304 U. S. 144, 152, followed this same rule:

"There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments, which are deemed equally specific when held to be embraced within the Fourteenth. See *Stromberg* v. *California,* 283 U. S. 359, 369-370; *Lovell* v. *Griffin,* 303 U. S. 444, 452."

In this same connection the words of Mr. Justice Roberts in *Schneider* v. *New Jersey,* 308 U. S. 147, are appropriate on the issues here presented, to wit:

> "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."

In this enclosure of civil rights and fundamental personal liberties secured by the express guarantees of the First Amendment to the Constitution, there is not established a broad channel in which the government and the courts may operate according to their discretion. The people, by these specific constitutional provisions, have definitely narrowed the channel of regulation and government activity and walled them in by high banks of rock on both sides of the governmental waters. This is to prevent a change of course of the stream and to keep the way straight and narrow. If the government gets out of its fixed course in these precious fields, there immediately arises a presumption of invalidity and unconstitutionality to throw back the stream of regulation into the fixed channel properly made by the people through their Constitution.

The construction and application given to the ordinance by the court below are mere flood waters which are out of the course established by the people. They should be rightly returned to their proper place and recede from the field of fundamental personal liberties belonging to petitioner.

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be sub-

mitted to vote; they depend on the outcome of no elections.

"In weighing arguments of the parties it is important to distinguish between the due process clause of the Fourteenth Amendment as an instrument for transmitting the principles of the First Amendment and those cases in which it is applied for its own sake. The test of legislation which collides with the Fourteenth Amendment because it also collides with the principles of the First, is much more definite than the test when only the Fourteenth is involved. Much of the vagueness of the due process clause disappears when the specific prohibitions of the First becomes its standard. The right of a state to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly, and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect. It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case." (Mr. Justice Jackson in *West Virginia State Board of Education* v. *Barnette,* 319 U. S. 624, 638-640.)

The judicial branch of the government rather than the legislative authority must decide when freedom of worship and freedom of maintaining a family must yield to the police power, and in performing this task this court must make a deeper inquiry than when property rights are involved.

"Mere legislative preferences for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions. It is imperative

that, when the effective exercise of these rights is claimed to be abridged, the courts should 'weigh the circumstances' and 'appraise the substantiality of the reasons advanced' in support of the challenged regulations." Murphy, *J.*, *Thornhill* v. *Alabama,* 310 U. S. 88.

In *Schneider* v. *New Jersey,* 308 U. S. 147, it is said: "And so, as cases arise, the delicate and difficult task falls upon the courts to weigh the circumstances and to appraise the substantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights."

Performance of this task cannot be presumed to have been undertaken by the legislature in the passage of the acts or laws which they pronounce. So long as legislators and those who apply and enforce the laws are perfect, are free from factional interests, are magnanimous and virtuous and without outside influence, it may be presumed that the circumstances warrant finding of constitutionality. But the plan of this government for an independent judiciary assumed that the legislators and enforcers of the law would not be so Utopian and contrary to uniform experience. Therefore the courts were created to weigh and decide conflicts between governor and governed on the theory that men and legislators and police will be as they are, imperfect, and not as they would be if they were perfect, free from vice and error.

This question has also been dealt with in *older days* by a well-known New York judge in the case of *Taylor* v. *Porter,* 4 Hill (N. Y.) 140, 143. If sustained, the effect of the principle applied by the courts below would be that a high and almost impregnable wall would be built around all ordinances turned out by the City Council. Citizens prosecuted under those ordinances would soon discover that the constitutional rights they have always regarded as being secure, above and beyond the power of legislative abrogation, would not be available to them until they were able to scale this wall of presumption by producing in court a preponderance of the evidence showing that these rights

have been infringed by the ordinance. In a case involving the highly debatable and technical issue of child welfare this presumption in favor of the ordinance might well govern the conclusion of the case and the definition of the fundamental right. This is to put the most cherished possession of all Americans at a definite disadvantage. Henceforth citizens would be dragged into court with their freedoms held in their hand, so to speak, and if they were not strong enough to protect these freedoms from the grasp of the prosecution seeking to wrest them away, then liberty would die an untimely death right in the courtroom, which has heretofore been the arena for the protection of these rights. Weakened immeasurably by the presumption against the freedoms even before reaching the courtroom, these freedoms would, like so much sand, soon slide through the fingers of the much-prosecuted citizenry, leaving the exalted police power supreme—as in Hitler's crumbling *reich*. If liberty is to be preserved and secured, then judicial presumptions must be in its favor and not, as here, in derogation of the cherished "four freedoms".

Until the respondent has discharged its duty, by proving a clear and present danger of substantial evils to the child from the activity which petitioner permitted her to engage in, the conviction cannot be sustained. In holding that the clear and present danger test must be applied to police-power abridgments of the liberties protected by the First Amendment the United States Supreme Court, in *Bridges* v. *California,* 314 U. S. 252, 262-263, 273, said:

"Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be 'substantial', Brandeis, J., concurring in *Whitney* v. *California,* supra, 274 U. S. at 374; it must be 'serious', *id.* 376. And even the expression of 'legislative preferences or beliefs' cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight

to warrant the curtailment of liberty of expression. *Schneider* v. *State,* 308 U. S. 147, 161.

"What finally emerges from the 'clear and present danger' cases is a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished. Those cases do not purport to mark the furthermost constitutional boundaries of protected expression, nor do we here. They do no more than recognize a minimum compulsion of the Bill of Rights. For the First Amendment does not speak equivocally. It prohibits any law 'abridging the freedom of speech or of the press'. It must be taken as a command of the broadest scope that explicit language, read into the context of a liberty-loving society, will allow. . . .

"In accordance with what we have said on the 'clear and present danger' cases, neither 'inherent tendency' nor 'reasonable tendency' is enough to justify a restriction of free expression. But even if they were appropriate measures, we should find exaggeration in the use of those phrases to describe the facts here."

It is not contended that Brooke Thornton was engaged in any more hazardous activity while in the custody and control of petitioner than were the many children who were at the time on the public sidewalks of Portland accompanying their parents while shopping, window-shopping, going to and from the theater, etc. It is not urged that the child was unattended or abandoned by petitioner upon the public streets. Indeed it could not so contend because of the record. It is not urged that the activity caused the child not to be sociable with other children. It is not said that the child was truant from school or neglectful of studies. There is no showing that the activity of the child caused her to be stolid, intolerant or unresourceful. The activity did not in any way impair the education, morals, welfare, physical or mental capacity of the child nor did it adversely affect any interest of the state. The act of worshiping Almighty God and preaching, benevolent as it is to mankind, must be

said to be more conducive to the well-being of a child than staying at home, accompanying parents to do shopping, or any other activity. It cannot be argued that any of the baneful results aimed at by the ordinance will follow.

Equally important, the conviction deprives petitioner of liberty and property without due process of law, contrary to the Fourteenth Amendment, in that the judgment of conviction was entered without a finding that respondent justified the operation of the ordinance by evidence clearly establishing that it was a reasonable means to the end sought to be accomplished and was not arbitrary, unreasonable or oppressive.

That an absolute prohibition such as that invoked against the public distribution of Bible literature by children such as petitioner's daughter could possibly further the interests of the state in preventing the evils of juvenile delinquency and child labor, is utterly preposterous.

The wave of juvenile delinquency that has swept the nation in fever of war is an alarming fact of which this Court will take judicial notice. Reckless and lawless gangs of teenaged youths loiter about the streets indulging in all manner of depravity. Pressed by an employment shortage, unscrupulous employers resort to illegal exploitation of child labor, resulting in a multitude of social derangements.* Every person possessed of his faculties of perception realizes that mere strict enforcement of laws against these practices as a remedy is as futile as seeking to prevent bodily ailments by punishing those who are taken ill. Now, in this time of world upheaval, the people, caught in a whirling maelstrom

* J. Edgar Hoover, Director of the F. B. I., attributes the appalling rise of juvenile delinquency to a lack of "certain fundamentals" in the growth of American youth, and sets forth an interesting statistical picture of the present situation. *Congressional Record,* Dec. 3, 1943 (p. A5642).

of violence pulling them to a vortex of social abnormalities, are in desperate need of the moral stabilization afforded by the comforting words of assurance from the Holy Bible.* Yet, the ordinance has been so construed as to permit the arrest and prosecution of a loving Christian parent who has raised her children to believe in and respect the law of Almighty God. By grotesque misapplication of social ordinances, it is made a crime for a clean-minded youngster to hand to another child or to an adult on the public street a publication announcing the establishment of Christ's blessed Kingdom of Righteousness that will for ever lift mankind out of the filth and mire of social debasement in which millions of people of all nations now wallow. Under the misapplied ordinance, so heinous is the offense of this little girl in distributing Bible literature pointing mankind to the only way in which they can enjoy these promised blessings, that the parent who permitted it is dragged to jail and threatened with the enforcement of the further sanctions of the ordinance permitting the officials to ravish the Christian home by rending asunder the parental relationship and placing the child in the custody of the judge of the juvenile court for Multnomah County.

Certainly an ordinance that would require the police to drag off to jail an upright little Christian girl and her mother unselfishly engaged in a work of the greatest importance to mankind is an utterly unreasonable assertion of police power, especially when it is considered that they are dragged off as culprits while juvenile truants, idlers and pranksters look on. The harsh consequences of an ordinance requiring the filling of the jails with Christians instead of criminals would soon reflect itself upon the community, and instead of abating the increasing number of

* In a case involving Jehovah's witnesses, the Florida Supreme Court declared concerning the social duty of the church, "Herein lies the obligation of the church and the press to point each generation the way to these virtues, and failing in this, they fail in their debt to the Bill of Rights." *Florida ex rel. Singleton* v. *Woodruff*, — Fla. —, 13 S. 2d 704.

juvenile delinquencies, idleness and godlessness would be encouraged.

These anomalies are called to the Court's attention to illustrate the gross unreasonableness of the ordinance as construed and applied by the courts below.

Conclusion

The controversy here is in the "no man's land" between personal constitutional freedom and the police power of the state. Petitioner has shown that the activity complained of results from her duty as a loving parent to train her child in obedience to the commandments of Almighty God and to allow the child to worship God as commanded in the Bible. She has shown that her activity and that of her daughter come squarely within the guarantee of freedom of worship secured by the First Amendment to the United States Constitution. Against this right, the state has attempted to assert its contrary right of *parens patriae* over the child by virtue of its police power. But the state has failed to justify its attempted denial of freedom of worship, and it is found that the state has transgressed the permissible bounds allowed by the Constitution.

To restore the fundamental constitutional right of freedom of worship to its proper sphere of supremacy and to clarify the law governing the burden of proof in such controversies, this petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON
Attorney for Petitioner